Where there is a sufficient warning given by the trial Judge but in the summing-up matters are suggested as being corroborative which in fact are not and there is in fact no corroboration at all then the conviction may be quashed by this Court. (*R. v. Phillips.*[2])

We now come to the second ground, which is in fact the main ground of appeal, and it is that the trial Judge erred in law in that he did not direct the Jury that it was dangerous and unsafe to accept the unsworn evidence of Chan Fong Chan unless the same was corroborated in a material particular implicating the first appellant.

It is clear, that although the summing-up was a very careful summing-up, this particular matter was not mentioned and in fact no warning was given to the Jury that it was dangerous to accept the unsworn evidence of Chan Fong Chan unless the same was corroborated in a material particular implicating the first appellant, and the point to consider is whether in a case of this kind there should be such a warning. The Court is satisfied that in this case there was no corroboration.

The position in this Colony in regard to evidence given by a child of tender age differs from that in England. In England it is expressly provided by statute that no person shall be convicted of an offence upon the unsworn testimony of a child of tender age unless that evidence is corroborated by some other material evidence in support thereof implicating the accused.

In this Colony there is no such legal requirement and an accused person may in law be convicted on such uncorroborated evidence but it has been wisely laid down in the case of *R. v. Velayuthan*[3] by the Straits Settlements Court of Criminal Appeal that "in the absence from our law of any statutory provisions corresponding to that in force in England, the acceptance of the unsworn evidence of a child should be subject to the same principles or rules of practice as apply to the acceptance of the evidence of accomplices." Applying the principle laid in that case it is clear that it was the duty of the trial Judge in the present case to direct the Jury that whilst it was open to them to do so yet it was dangerous to act on the unsworn evidence of the child Chan Fong Chan unless such evidence was corroborated in some material particular implicating the accused. It was most unfortunate that Counsel who appeared in this case, both for the Crown and the appellants, did not draw the attention of the Court to the relevant decisions on this point.

The Court cannot say that if the warning had been given in this case the Jury must have convicted the first appellant. In these circumstances there is no course open to us but to allow the appeal not only of the first appellant but also the appeals of the second and third appellants whose convictions stand or fall with that of the first appellant.

Appeals allowed.

Solicitors: *David Marshall & Co.; L. Rayner.*

In re KOH SEK LIM, DECD.; THE PUBLIC TRUSTEE, SINGAPORE v. KOH KONG WAN & ANOR.

[O.C.J. (Whyatt C.J.) August 1, 1958]

[Singapore — Originating Summons No. 48 of 1958]

Will — Construction — Direction to pay certain expenses and outgoings from estate — Estate consisting of immovable property — Trustee having no power to sell or otherwise dispose of any of the corpus of the trust property.

The testator, Koh Sek Lim, died in 1948 leaving a Will which contained a number of unusual provisions some of which the Court was asked to construe in these proceedings. The assets comprised in the estate were also somewhat unusual. They consisted of cash in the bank and a large parcel of land of 536 acres containing extensive and valuable sand deposits, known as the Bedok Estate, and a few miscellaneous parcels of land of no particular importance. The cash in the bank and proceeds of sale of the miscellaneous parcels of land were applied in payment of estate duty and funeral expenses. After all testamentary expenses had been paid, the estate consisted of only one asset, i.e., the Bedok Estate.

By his Will the testator directed his trustees to stand possessed of his residuary estate after payment of debts and testamentary expenses and manage the same during the Trust Period, i.e., the lifetime of his sons and daughters and 21 years after the death of the last survivor of them, to distribute the income among his sons and daughters and two widows and at the expiration of the Trust Period, to divide the estate among the issue of his children *per stirpes* in certain specified shares. By clause 6 of his Will the testator declared that during the Trust Period, his trustees "shall not sell or otherwise dispose of any immoveable property forming part of my residuary estate." He also directed his trustees with regard to the application of income during the Trust Period to "Pay all quit rents, assessments, costs of repairs and insurances and other outgoings in respect of my residuary estate." The Will also directed the trustees to "set apart a Reserve Fund to meet any extraordinary expenditure which may be payable in respect of my residuary estate such sums as my trustees shall from time to time think fit, but

so that such fund shall not at any time exceed the sum of $10,000."

Between the years 1950 and 1956 a total area of about 347 acres out of the Bedok Estate was acquired by the Crown in lots from time to time under the Land Acquisition Ordinance (Cap.248). The Public Trustee before accepting the compensation in each acquisition case sought the opinion of the valuers and thus incurred the liability for valuation fees, etc. Further expenditure was incurred for assessor's fees, and valuation fees, survey fees and solicitors' fees in Originating Summons No. 126 of 1950.

As the testator's residuary estate consisted only of immovable property, it followed that the trustees had no power under the Will to sell or otherwise dispose of any of the *corpus* of the trust property during the Trust Period. The present proceedings were instituted to determine whether the expenditures incurred by the Public Trustee should be paid out of income or out of the *corpus* of the residuary estate.

Held: (1) it was the testator's intention that the trustees should keep the residuary estate intact so that when the time came at the end of the Trust Period to distribute it amongst his grand children and great grand children, the *corpus* would not have suffered erosion by expenditure incurred in the meantime;

(2) the expenditure incurred by the Public Trustee in valuation fees and solicitors' fees, etc., should be paid out of income;

(3) the operation of the reserve fund is entirely a matter for the discretion of the trustees subject to the limitation that the amount of income accumulated in the fund must not at any one time exceed $10,000 and that the fund must be used only for extra-ordinary expenditure. The trustees in exercising their discretion must act fairly and prudently and if the reserve fund is at any time insufficient to meet extra-ordinary expenditure, it must be met out of current income or out of income accumulated in the reserve fund in the future.

Cases referred to:—

(1) *Syed Omar bin Shaikh Alkaff v. Syed Abdulrahman bin Shaikh Alkaff*, (1946) M.L.J. 63, P.C.

(2) *Bowes v. Strathmore* (1844), 8 Jur. 92

ORIGINATING SUMMONS.

W. G. Alcock for the Public Trustee.

N. A. Christopher for the 1st defendant.

N. A. Mallal (*Yusuf Jumabhoy* with him) for the 2nd defendant.

Cur. Adv. Vult.

Whyatt C.J.: — The testator, Koh Sek Lim, died on the 20th August, 1948, leaving a will dated the 6th March, 1944, which contained a number of unusual provisions some of which the Court is asked to construe in these proceedings. The assets comprised in the estate were also somewhat unusual. They consisted of cash in the bank and a large parcel of land of 536 acres containing extensive and valuable sand deposits, known as the Bedok Estate, and a few miscellaneous parcels of land of no particular importance. The cash in the bank and the miscellaneous parcels of land were applied in payment of estate duty and funeral expenses, and the position, after all testamentary expenses had been paid, was that the estate consisted of only one asset, namely, the Bedok Estate. It was, however, a substantial asset producing valuable sand royalties which, as a result of recent improvements in the methods of working the sand deposits, are likely to be considerably larger in the future.

The testator, by clause 5 of his will, devised and bequeathed the whole of his residuary estate to trustees upon trust during the Trust Period (defined in the will as the life time of his sons and daughters and 21 years after the death of the last survivor) to distribute the income among his sons and daughters and two widows and at the expiration of the Trust Period, to divide the estate among the issue of his children *per stirpes* in certain specified shares. The testator then proceeded, in clause 6 of the will, to declare as follows:

> " I declare that during the Trust Period my trustees shall not sell or otherwise dispose of any immoveable property forming part of my residuary estate and that they shall be at liberty to retain any of my investments in their existing form without being liable for any loss which might arise thereby."

As the testator's residuary estate consisted only of immoveable property, namely, the Bedok Estate, it follows the trustees have no power under the will to sell or otherwise dispose of any of the corpus of the trust property during the Trust Period.

The scheme of the will, if I may so term it, was not dissimilar from the scheme of the settlement considered by the Privy Council in the case of *Syed Omar bin Shaikh Alkaff v. Syed Abdulrahman bin Shaikh Alkaff*.[1] In that case the settlor conveyed immoveable property in Singapore to trustees upon trust to distribute the income during a trust period (defined by reference to lives in being and 21 years after the death of the last survivor) among certain beneficiaries and at the expiration of the trust period, to divide the property among certain grand children; further the settlor declared, in a later clause of the settlement, that the settlement deed should not be deemed to confer upon the trustees any power to sell, mortgage, alienate or otherwise charge the trust property. Thus in *Alkaff's case*, as in the present case, there was a trust period during which the trustees were

required to distribute income from immoveable property and were forbidden in the meantime to sell any of this property. Lord Justice Clauson, delivering the judgment of the Privy Council in the *Alkaff's case*, made a reference to the judgment in the Court of first instance where the learned Judge, having reached the conclusion that the settlor's intention was to keep the capital intact and pay all expenditure whatsoever out of income, had observed: "I know of nothing which would make it unusual for an Asiatic settlor to take this attitude to his estate"; and the learned Lord Justice, after examining the matter at length, concluded that the judgment of the Court of first instance, and the judgments of the Court of Appeal affirming it, were correct.

It is, of course, true that no decision on a question of construction founded upon the words of a particular instrument can be conclusive of the construction to be placed upon different words in another instrument but the general tenor of two instruments may nevertheless be so similar that a decision on one of them affords useful guidance in arriving at a decision on the other, and I reach the conclusion that it was the testator's intention in this case, as it was the settlor's intention in *Alkaff's case*, that the trustee should keep the residuary estate intact so that when the time came at the end of trust period to distribute it among the testator's grand children and great grand children, the corpus would not have suffered erosion by expenditure incurred in the meantime.

This being, in my view, the intention of the testator when framing his will, I now proceed to consider whether in the events which have happened and in the light of the other provisions of the will, he has achieved his object. The first of these events occurred about two years after the testator's death. On the 27th November, 1950, the Governor-in-Council made a declaration under the Land Acquisition Ordinance that 2 acres 1 rood of the Bedok Estate were required for a public purpose. The Collector of Land Revenue, thereupon, proceeded, in accordance with the provisions of the Ordinance, to acquire the land compulsorily from the Public Trustee (who had been appointed Administrator with the will annexed by Order of Court in January 1949) and awarded the sum of $53,905.50 as compensation. The Public Trustee was at liberty to accept this sum, or, if he thought the compensation insufficient, he was entitled to have the matter referred to the Court for determination. Before deciding which course to adopt, the trustee, very properly and prudently, sought the opinion of two firms of valuers and having considered their valuations decided to accept the sum awarded by the Collector. The valuers fees were $992.00 and the question arises whether this sum should be paid out of income or out of capital. There were further compulsory acquisitions of other portions of the Bedok Estate in 1951, 1952, 1955 and 1956 and in each of these acquisitions the Public Trustee followed the same procedure of obtaining the advice of valuers and in one instance, where the parcel of land included valuable sand deposits, the advice of other technical experts and legal assistance, but in principle, there is nothing to differentiate the expenditure incurred under the subsequent acquisitions from that incurred under the first acquisition in 1950. The question for decision in this case, therefore, resolves itself into a question whether the expenditure of $992.00 incurred by the Public Trustee in valuation fees before deciding to accept the award of compensation is to be paid out of income or out of the corpus of the residuary estate.

The directions of the testator with regard to the application of income during the Trust Period include the following provision:

> "Pay all quit rents, assessments, costs of repairs and insurance and other outgoings in respect of my residuary estate."

The words "outgoings", as Clauson L.J. said in *Alkaff's case, supra*, is a word of wide meaning and a payment of fees to a valuer for valuing part of the residuary estate is undoubtedly an outgoing in respect of the residuary estate, whatever the source from which the payment is made. The only question is whether the testator intended this outgoing to be paid from the income of the residuary estate or from the residuary estate itself. It was contended on behalf of the first defendant who represented income that the testator could not have intended this expenditure to come out of income, since it was incidental to something which he never contemplated at all, namely, the disposal of the immoveable property comprised in his residuary estate during the trust period. It was argued, therefore, that this expenditure should be regarded, not as an outgoing in respect of the residuary estate and therefore payable out of income, but as a necessary deduction to be made from the compensation award in order to arrive at the true monetary equivalent of the property disposed of to Government. The fallacy in this argument, in my view, is twofold. In the first

place, although it may be true the testator did not contemplate voluntary disposal by his trustee of his immoveable property during the trust period, *non constat* he did not contemplate the possibility that the Government might compel his trustee to dispose of it under its statutory powers. Secondly, even if the testator did not contemplate the possibility of compulsory acquisition during the trust period, it by no means follows that because he did not foresee that this particular expenditure might arise, he therefore intended an outgoing of this character should come out of capital rather than income. The whole tenor of the will, as I have already explained, points to an intention on the part of the testator to preserve the corpus of the residuary estate intact until the end of the trust period and it would obviously conflict with his intention if an outgoing were paid out of capital whenever it could be said that the particular expenditure had not been foreseen by the testator. There may well be many outgoings of an unusual and unexpected character during the course of the trust period which were not within the contemplation of the testator and could not have been reasonably foreseen by him when he made his will and if the construction contended for by the first defendant were adopted, it would certainly result in serious inroads being made into capital before the date of distribution. In my view, it is plain, construing the will as a whole, that the testator's intention was that the capital should be kept intact and in order to achieve this end, he directed that outgoings should be paid out of income. As the Privy Council said in *Alkaff's case*, so, with respect, I say in this case, the word outgoing is a word of wide meaning and is sufficient in itself to cover the expenditure in question in these proceedings.

This construction receives support, in my opinion, from other provisions in the will which require the trustees to manage the residuary estate during the trust period and to use the income of the residuary estate to pay "the expenses of management of the properties of (the) residuary estate." These words, like the word "outgoings", are very wide in their scope and give to the trustees large powers during the trust period. In the case of *Bowes v. Strathmore*,[2] the Court was called upon to construe a provision in a will that "the trustees.....shall generally superintend the management of the.....manors, hereditaments, and premises, and it was held that a power of management expressed in these terms was to be exercised according to the discretion of the trustees and unless what they did in exercise of the power to superintend and manage was not a fair exercise of the discretion, the Court must, of necessity, uphold what they had done. Similarly in the present case, the power of managing the properties of the residuary estate is a power to be exercised according to the discretion of the trustee and in my view, the trustee properly exercised his discretion in this case, and indeed did no more than any prudent owner managing his own property would have done, when he sought and obtained expert advice as to the value of the property before deciding whether to accept the Collector's award of compensation. That being so, it cannot be said, in my view, that the cost of obtaining such expert advice was not an expense of management within the meaning of those words in the will. Accordingly, therefore, I am of the opinion that the payment of these valuation fees was not only an outgoing but was also an expense incurred in the management of the properties of the residuary estate within the meaning of those words as used in the will and therefore under both heads, these fees are properly payable out of income. The same applies to the other disbursements made in connection with the further compulsory acquisitions which took place in 1951, 1952, 1955 and 1956.

There remains another question of quite a different character to be dealt with in this originating summons. After directing the trustee to apply the income of the residuary estate in payment first, of outgoings, secondly, of management expenses, and thirdly, of certain monthly allowances to beneficiaries, the will continues as follows:

> "Fourthly: set apart for a Reserve Fund to meet any extra-ordinary expenditure which may be payable in respect of my residuary estate such sums as my trustee shall from time to time think fit, but so that such fund shall not at any time exceed the sum of dollars ten thousand; and lastly, distribute once in every two years all surplus income, (if any) in the hands of my trustee among my sons, my daughters and my wives, in the same proportions as the amounts of their respective monthly allowances.....".

Although an express direction to a trustee to set up a reserve fund out of income is an unusual, perhaps a unique, feature in a will, it is not difficult, in the context of the present will, to collect the intention of the testator in making this provision. The resemblance between this provision and the accounting arrangements of business enterprises where it is common practice

to establish a reserve fund to meet fluctuations in expenditure is immediately apparent and it is, in my opinion, clear that the intention of the testator was that the trustee should pay extra-ordinary expenses over and above normal or recurrent expenses incident to the management of his residuary estate out of this reserve fund and thus reduce, perhaps even eliminate, the fluctuations which would otherwise inevitably occur if extra-ordinary expenditure had to be met on an *ad hoc* basis as and when it arose. But although the purpose of this provision is plainly indicated in the will, it was contended by the Public Trustee that its application in practice was a matter of some difficulty. Counsel on behalf of the Public Trustee pointed out that the provision in the will immediately following the direction to set up a reserve fund requires the trustee to make a distribution of surplus income to beneficiaries once every two years and the question therefore arises whether it was the testator's intention that the reserve fund should be used to meet extra-ordinary expenditure once only in each accounting period; alternatively, whether, if the reserve fund is not linked with the accounting period, it can be used whenever and as often as extra-ordinary expenditure arises, or, to put the matter another way, whether the trustee has a discretion as to the time and manner in which the reserve fund is to be set apart, appropriated and re-plenished to meet extra-ordinary expenditure.

The short answer to this question, in my view, is that if the testator had intended to relate the reserve fund to the accounting period, he would have directed that it be set apart to meet extra-ordinary expenditure "once in every two years" using the very same words which he used in the following paragraph of the will in relation to the distribution of surplus income. But so far from using such words, he merely directed the trustee to set apart such sums as he shall from time to time think fit and the only restriction imposed upon the trustee's action is that the fund shall not at any time exceed 10,000 dollars. It seems to me plain that the trustee has been given a complete discretion as to the time and manner in which he may set apart income for a reserve fund, the only limitation being that the discretion must be exercised fairly just as the discretion in *Bowes v. Strathmore, supra,* (which was a discretion relating to the management of an estate) had to be exercised fairly. It may happen that the trustees, properly exercising their discretion, decide not to set apart the full amount of 10,000 dollars, or having set apart that sum and appropriated it, decide not to set apart further sums from income for the reserve fund for the time being, and in consequence there is insufficient to meet a liability for extra-ordinary expenditure. If this situation should occur, then to that extent the fluctuations in expenditure, though modified, will not have been entirely eliminated, and therefore the debit balance of extra-ordinary expenditure will have to be met from current income or from a reserve fund to be created at some future date. It is erroneous to suppose, as was suggested in argument, that extra-ordinary expenditure may be paid out of capital whenever the reserve fund is insufficient to meet. The reserve fund itself is merely an accumulation of income and if extra-ordinary expenditure cannot be met from that accumulated income, then it should be met from current income or from income to be accumulated in the reserve fund in the future. To sum up. In my judgment the operation of the reserve fund is entirely a matter for the discretion of the trustee subject to the limitation that the amount of income accumulated in the fund must not at any one time exceed 10,000 dollars and that the fund must be used only for extra-ordinary expenditure. The trustee, in exercising his discretion must, of course, act fairly and prudently and if the reserve fund is at any time insufficient to meet extra-ordinary expenditure, it must be met out of current income or out of income accumulated in the reserve fund in the future.

The foregoing disposes of the substantial points raised in this originating summons but I should add, for the sake of completeness, that the first and second defendants were ordered to represent all persons interested in income and capital respectively and that it was agreed by all parties in the course of the proceedings that a minor item of expenditure, number 1 in the schedule to the summons, was properly deductible from capital as being a testamentary expense. I would add further that if any of the items in the schedule other than item 1 have already been paid out of capital, the trustee may, in his discretion, now recoup the corpus out of the reserve fund or if the reserve fund is insufficient, out of income accumulated in the reserve fund in the future, or out of current income.

As regards costs, it appears to me that similar considerations apply in this case as in *Alkaff's case* where the Privy Council ordered

costs to be paid out of income and accordingly I order that the costs of these proceedings be paid out of income.

Order accordingly.

Solicitors: *Laycock & Ong; de Souza & Christopher; Mallal & Namazie.*

R. SABAPATHY v. PUBLIC PROSECUTOR

[C.A. (Thomson C.J., Smith and Syed Sheh Barakbah JJ.) September 5, 1958]

[Penang — F. M. Criminal Application No. 1 of 1958]

Criminal Law and Procedure — Appeal to Court of Appeal — Courts Ordinance, 1948, s.34 — Interpretation — Question of extension of time.

A person wishing to appeal under section 34 of the Courts Ordinance, 1948 must obtain the necessary certificate and must then file it within 30 days or within such extended period as the Court of Appeal may allow. The Court of Appeal cannot consider any question of extension of time until it is known whether or not a certificate has been in fact obtained (or will be obtained in the event of an extension of time being granted).

CRIMINAL APPLICATION.

Thomson C.J.: — This applicant was tried in the Sessions Court at Kuala Trengganu for an offence in contravention of section 3(a) of the Prevention of Corruption Ordinance, 1950. He was acquitted and discharged. With the merits of the acquittal we are not here concerned.

The Public Prosecutor appealed and in the event the order of acquittal and discharge was set aside, a conviction was substituted for it and the applicant was sentenced to three months' imprisonment.

The position then was that the appellant had no further right of appeal unless he could obtain the certificate of the trial Judge or the certificate of the Public Prosecutor under section 34 of the Courts Ordinance.

There would seem to have been some genuine misunderstanding on the applicant's part as to his rights in this connection for which, we hasten to add, the Prisons authorities were in no way responsible. Be that as it may, however, he applied to the Public Prosecutor for a certificate, which he did not obtain, but apparently omitted to apply to the trial Judge.

In the circumstances he filed the present application in which he asked for "an order that the time to appeal to the Court of Appeal be extended and for an order that the Attorney-General be justified in issuing a certificate to the applicant under section 34 of the Courts Ordinance, 1948".

When the matter came on before us, counsel asked leave to amend the application by substituting for the relief asked an order for extension of time within which to file the certificate under section 34 if it was obtained. We granted the application to amend and adjourned consideration of the application as amended to the next sitting of the Court at Penang.

The interpretation of section 34 of the Courts Ordinance is not altogether free from difficulty. Nevertheless, subject to anything that may be said in argument at a later stage, it seems to us that a person wishing to appeal under that section must obtain the necessary certificate and must then file it within thirty days or within such extended period as the Court of Appeal may allow. Clearly on that view this Court cannot consider any question of extension of time until it is known whether or not a certificate has been in fact obtained (or will be obtained in the event of an extension of time being granted) and it was for that reason that we adopted the course which has been described.

Order accordingly.

AZIZ BIN SHARIFF v. EASY BUS CO. & ORS.

[O.C.J. (Buttrose J.) September 12, 1958]

[Singapore — Suit No. 8 of 1957]

Damages — Personal injuries, loss and damage suffered as a result of accident — Prolonged confinement in bed — Loss of kidney — Remoteness of damage.

The plaintiff sued the defendants for damages for personal injuries, loss and damage he suffered as the result of an accident which occurred in March 1956 between the 1st defendant's bus (in which he was a passenger) driven by the 2nd defendant and the 3rd defendant's lorry driven by the 4th defendant. The 3rd and 4th defendants having admitted liability for the accident, the plaintiff's claim against the 1st and 2nd defendants were dismissed with costs payable by the 3rd and 4th defendants. The only question remaining to be determined was as to quantum of damages to which the plaintiff was entitled as against the 3rd and 4th defendants.

The plaintiff sustained a broken leg and was confined to a Hospital bed in the first instance for 5 months. The plaintiff's evidence was that after he had been in the Hospital for 3 months he felt a pain in his stomach. The pain continued intermittently until April 25, 1958 when he was operated on and his right kidney was removed as there was a stone in it. At the hearing the plaintiff applied to amend the statement of claim by adding under "Particulars of Injuries" a new paragraph: "Loss of right kidney involving a further